

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 20, 2013 which denied the appellant's request for a supplement to cover the full cost of a custom-made foot orthotic because:

- a medical or nurse practitioner did not confirm that a custom-made foot orthotic is medically required, pursuant to Section 3.10(3)(a) of Schedule C of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR); and,
- the custom-made foot orthotic will be made from a 3-D digital scan and not from a hand-cast mold, as required by Section 3.10(3)(d) of Schedule C of the EAPWDR.

## PART D – Relevant Legislation

*Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR), Section 62 and Schedule C, Sections 3 and 3.10

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

- 1) Request for Consultation dated March 14, 2013 from the appellant's family physician to the doctor of podiatric medicine (DPM) with the reason for the referral indicated as "flat feet;"
- 2) Orthoses Request and Justification signed by a DPM on April 23, 2013 in which the appellant's medical condition is described as "plantar fasciitis/ pes planus" and a rigid, custom, (illegible), functional" orthosis is recommended. In response to the question whether the orthosis will be made from a hand cast mold, the DPM checked "no" and noted "3-D digital scan";
- 3) Request for Consultation with a fax date of August 1, 2013 from the appellant's family physician to the DPM with the reason for the referral indicated as "...female with severe flat feet with degenerative arthritis in metatarsophalangeal joints; "
- 4) Request for Reconsideration- Reasons dated July 30, 2013.

At the hearing, the appellant provided the following additional documents:

- 1) Business cards for the DPM who completed the Orthoses Request and for a vascular and endovascular surgeon;
- 2) Print out of the podiatric medicine section from the Ministry of Health website, which states in part that the College of Podiatric Surgeons of B.C. is the regulatory body established for the health profession of podiatric medicine;
- 3) Immigration Record of Landing dated October 27, 1989;
- 4) CPP Statement of Contributions dated October 30, 2008 for the appellant and dated September 8, 2011 for her husband;
- 5) Medical Imaging Report dated December 20, 2011 which summarizes that "osteoporosis is present; these measurements indicate high risk for fracture (greater than 20%) in the next 10 years;"
- 6) Confirmation of Benefits paid from Service Canada dated February 28, 2013;
- 7) Letter dated September 20, 2013 from the appellant's family physician which states in part that he has been the appellant's family physician for the last 21 years. In January 2008 she sustained a massive hemorrhagic stroke for which she never fully recovered. She experiences problems with her balance and has tripped several times. She is presently using walking poles. In order to improve her stability she will benefit greatly from having custom-made orthotics. At worse she is at risk of falling and fracturing her hip;
- 8) Letter dated September 23, 2013 from the DPM, stating in part that the appellant was referred to him by her family physician on April 23, 2013 to investigate severe flat foot deformity which engendered arthritis in the metatarsal phalangeal joints. The appellant related she walks with her left side affected and significant arch pain. He diagnosed severe 'has planus' (sic) with a circumducted gate. This is not simple flat foot, but a severe flat foot deformity with degenerative arthritis and lack of a custom molded rigid foot orthotic will cause significant deterioration of the ability to walk. In most advanced medical podiatry offices, digital scanning is replacing cast molding. He had filled in the application form that he would be using a digital scan but the orthosis will be make from a hand cast mold which will take more of his time. He is a licensed podiatrist under the College of Podiatric Surgeons which is governed under the *Health Professions Act* and podiatrists are governed under health care providers within B.C. The appellant's family physician, who is a member of the College of Physicians and Surgeons recommends that the appellant have custom orthotics.

The ministry did not object to admission of the letters from the appellant's family physician or the DPM but objected to the remaining documents on the basis that they are not relevant to the issues on appeal. The panel reviewed the documents and admitted those providing further information regarding the appellant's medical condition and the medial professionals' qualifications, as being in support of information and records that were before the ministry on reconsideration. The panel did not admit the Immigration document and the CPP statements of contribution and benefits paid as the appellant's status and finances were not part of the information and record before the ministry when the decision being appealed was made.

In her Notice of Appeal the appellant indicated that she disagrees with the ministry's reconsideration decision. She wrote that she cannot afford custom orthotics. The appellant wrote that she will bring two more supporting letters regarding her case and she will present her problem in person.

In the Request for Reconsideration, the DPM wrote that the appellant has "...severe flat foot deformity with degenerative arthritis. She cannot walk/ stand without orthotic support."

At the hearing, the appellant stated that she was not sure how to answer the questions and she made mistakes on the application. The appellant explained that the vascular surgeon is the specialist who performed her most recent surgery due to blood clots that made it so she could not walk. The appellant stated that in 2008 she suffered a massive aneurysm from which she has not fully recovered. The appellant stated that the left side of her body is impacted and she is thankful that she still has use of her right side or she would not be able to talk or walk. Her left eye has different vision than her right and she has no sensation in her left hand. Her left foot is different than her right, her arches are different and one is higher than the other so she needs custom-made orthotics. The appellant stated that the Medical Imaging Report shows that she has severe osteoporosis and she is at high risk of fracture if she falls. She fell once and fortunately did not break a bone and she now walks with walking poles. Walking is important to her. The appellant pointed out that the DPM is a specialized doctor who performs surgeries on feet all the time. He has stated in his letter that he will make the custom-made orthotic from a hand cast mold.

The ministry relied on the reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which denied the appellant's request for a supplement to cover the cost of a custom-made foot orthotic because a medical or nurse practitioner did not confirm that a custom-made foot orthotic is medically required and the custom-made foot orthotic will be made from a 3-D digital scan and not from a hand-cast mold, was reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Under Section 62 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), in order to be eligible for health supplements in Section 2 or 3 of Schedule C, the person must be a recipient of disability assistance, be a person with disabilities, or be a dependent of a person with disabilities as detailed in the section. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that the person's family unit must meet in order to qualify for specified medical equipment and devices.

Medical equipment and devices – orthoses

3.10 (1) In this section:

"off-the-shelf" , in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;

"orthosis" means

- (a) a custom-made or off-the-shelf foot orthotic;
- (b) custom-made footwear;
- (c) a permanent modification to footwear;
- (d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);
- (e) off-the-shelf orthopaedic footwear;
- (f) an ankle brace;
- (g) an ankle-foot orthosis;
- (h) a knee-ankle-foot orthosis;
- (i) a knee brace;
- (j) a hip brace;
- (k) an upper extremity brace;
- (l) a cranial helmet used for the purposes set out in subsection (7);
- (m) a torso or spine brace;
- (n) a foot abduction orthosis;
- (o) a toe orthosis.

(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

- (a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,
- (b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
- (c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
  - (i) to prevent surgery;
  - (ii) for post-surgical care;
  - (iii) to assist in physical healing from surgery, injury or disease;
  - (iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and
- (d) the orthosis is off-the-shelf unless

- (i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
  - (ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.
- (3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements in subsection (2) of this section, all of the following requirements must be met:
- (a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically required;
  - (b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist;
  - (c) Repealed. [B.C. Reg. 144/2011, Sch. 2.]
  - (d) the custom-made foot orthotic must be made from a hand-cast mold;
  - (e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed \$450.

Section 29 of the *Interpretation Act*, RSBC 1996, c 238 provides:

**Expressions defined**

29 In an enactment:

"medical practitioner" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the Health Professions Act to practise medicine and to use the title "medical practitioner."

*Ministry's position*

The ministry's position is that the appellant, as a recipient of disability assistance, is eligible to receive health supplements under Section 62 of the EAPWDR, but that the appellant's request for a supplement to cover the cost of custom-made foot orthotics does not meet all of the legislative criteria set out in Schedule C. The ministry pointed out that, pursuant to Section 3.10(3)(a) of Schedule C of the EAPWDR, a medical or nurse practitioner must confirm that the custom-made foot orthotic is medically required. The ministry stated that while a DPM confirms that a custom-made orthosis is required in the Orthoses Request and Justification, a DPM is not a medical practitioner as defined by the *Interpretation Act*. The ministry argued that the information from the appellant's family physician in the Request for Consultation, with the reason for the referral to the DPM indicated as "...female with severe flat feet with degenerative arthritis in metatarsophalangeal joints," does not constitute confirmation that a custom-made foot orthotic is medically required. At the hearing, the ministry further argued that the new letter from the appellant's family physician, which indicated that the appellant will "benefit greatly" from having custom-made orthotics, also does not constitute confirmation that a custom-made foot orthotic is medically "required."

The ministry pointed out that, pursuant to Section 3.10(3)(d) of Schedule C of the EAPWDR, the custom-made foot orthotic must be made from a hand-cast mold and the DPM indicated in the Orthoses Request and Justification that the custom-made foot orthotic will not be made from a hand-cast mold.

*Appellant's position*

The appellant's position is that a DPM indicated in the Orthoses Request and Justification that a custom-made foot orthosis is required, and a DPM is a specialized doctor who performs surgeries and has qualifications equal to that of a medical practitioner. The appellant argued that her family physician, who is a medical practitioner, wrote an additional letter, dated September 20, 2013, that the custom-made foot orthotic is medically required to improve her stability. The appellant pointed out that her family physician wrote in his letter that she experiences problems with her balance and that she has tripped several times, and the appellant argued that this poses a risk of her fracturing her hip due to severe osteoporosis. The appellant also argued that the DPM wrote in his letter dated September 23, 2013 that he will make the orthotic from a hand-cast mold.

*Panel decision*

The panel finds that it is not disputed that the appellant, as a recipient of disability assistance, is eligible to receive health supplements under Section 62 of the EAPWDR, and that the appellant's request has satisfied all but two of the additional criteria to qualify for a custom-made orthotic under Section 3.10 of Schedule C of the EAPWDR. In particular, Section 3.10(3)(a) of Schedule C stipulates that a medical practitioner or a nurse practitioner must confirm that a custom-made foot orthotic is medically required. The panel finds that the ministry reasonably concluded that while a DPM confirms that a custom-made orthosis is required in the Orthoses Request and Justification, a DPM is not a medical practitioner as defined by section 29 of the *Interpretation Act*. As set out in the print out from the website for the ministry of health, a DPM is a registrant of the College of Podiatric Surgeons of B.C. rather than of the College of Physicians and Surgeons of B.C., as required.

The appellant's family physician, who is a medical practitioner, indicated in his letter dated September 20, 2013 that the appellant sustained a massive hemorrhagic stroke for which she never fully recovered, that she experiences problems with her balance and has tripped several times and, in order to improve her stability, she "...will benefit greatly from having custom-made orthotics." The panel finds that the medical practitioner stops short of stating that a custom-made foot orthotic is medically "required" by the appellant to address her medical condition and he referred to the appellant presently using walking poles to assist with her balance. The panel finds that the ministry reasonably determined that a medical or nurse practitioner has not confirmed that a custom-made orthotic is medically required, pursuant to Section 3.10(3)(a) of Schedule C of the EAPWDR.

Pursuant to Section 3.10(3)(d) of Schedule C of the EAPWDR, the custom-made foot orthotic must be made from a hand-cast mold and the DPM indicated in his letter dated September 23, 2013 that, although he reported in the original application form that he would be using a digital scan as the newer technology, he will make the orthotic from a hand-cast mold. The panel finds that, considering this additional letter from the DPM, the ministry was not reasonable in determining that the custom-made foot orthotic will not be made from a hand-cast mold pursuant to Section 3.10(d) of Schedule C of the EAPWDR.

*Conclusion*

The panel finds that the ministry's decision that denied the appellant's request for a supplement to cover the cost of a custom-made foot orthotic because the request does not meet all of the required legislative criteria in section 3.10 of Schedule C of the EAPWDR was reasonably supported by the evidence and confirms the decision.